**International Brotherhood of Electrical Workers, Local Union No. 46, AFL–CIO *and* Puget Sound Chapter, National Electrical Contractors Association.** Cases 19–CB–6367, 19–CB–6368, 19–CC–1841, and 19–CE–85

May 24, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On May 17, 1989, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent Union filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the administrative law judge's decision and an answering brief. The Charging Party also filed an answering brief and the International Brotherhood of Electrical Workers, AFL–CIO, and the National Electrical Contractors Association filed a joint amicus brief in support of the Respondent.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

In this case the judge found that the Respondent Union violated several different subsections of Section 8 of the Act. All the violations found are dependent on the judge's threshold finding that the Union's pursuit of a contract grievance violated Section 8(e) of the Act. Because we are not persuaded that Congress intended Section 8(e) to apply to the conduct at issue here, we reverse the decision of the judge and dismiss the complaint.

### A. *Factual Findings*

The facts are not in dispute. The Charging Party, the Puget Sound Chapter of the National Electrical Contractors Association (Chapter), is an association whose members include both union and nonunion electrical contractors. It negotiates, on behalf of its unionized contractor members, a multiemployer collective-bargaining agreement with the Union. The 1986–1988 agreement provided that the ''Union shall be the sole and exclusive source of referral of applicants for employment.'' Section 5.4 of the agreement provided that the Union would refer applicants ''without discrimination against such applicants by reason of membership or nonmembership in the Union.'' The agreement also provided that the Union would administer a joint labor-management apprenticeship training program and that ''[a]pprentices shall be hired and transferred in accordance with the apprenticeship provisions of the agreement between the parties.''

The Chapter also offered two services for the benefit of its nonunion contractor members: a referral service for journeyman electricians and an apprenticeship training program. The Union expressed its disapproval of these nonunion programs to the Chapter orally, but it was not until May 31, 1988, that the Union filed a grievance pursuant to the provisions of the contract. After the Chapter denied the grievance, the Union pursued it to the Council on Industrial Relations for the Electrical Contracting Industry (CIR), the arbitral forum that the parties had agreed in their 1986–1988 contract to use for contract grievances.[1] On August 16, 1988, the CIR issued a decision in favor of the Union, ruling that the Chapter had violated the basic principles which define the spirit and intent of the contract by administering a job referral program and participating in an apprenticeship training program other than those specified in the contract. It ordered the Chapter to cease and desist from engaging in both activities. On September 14, 1988, the Chapter's board of directors voted to comply with the CIR award, and by October 13, both programs had been terminated.

On October 11, 1988, the Chapter filed suit in district court under Section 301 of the Act, seeking vacation of the CIR award and damages. Thereafter, the Regional Director for Region 19 petitioned the court pursuant to Section 10(l) of the Act for an injunction against the enforcement of the CIR award. The court granted the 10(l) petition and stayed both actions pending a ruling by the Board. On April 2, 1990, the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision.[2]

### B. *The Judge's Decision*

The administrative law judge found that the Union violated Section 8(e), 8(b)(4)(ii)(A), 8(b)(1)(A), and 8(b)(2) of the Act by its actions. As to Section 8(e), he found that the labor agreement provisions, as interpreted by the CIR, are unlawful because they have an object of benefiting union members generally rather than one of solely benefiting unit employees. They require the Chapter, in effect, to cease doing business with its nonunion contractor members because, without the referral services, those members would withdraw

[1] The Chapter filed the instant unfair labor practice charges with the Board on July 26, 1988, just prior to the Union's August 2, 1988 submission to the CIR.

[2] *Nelson v. Electrical Workers IBEW Local 46*, 899 F.2d 1557 (1990). We note that the Ninth Circuit, in affirming the district court's issuance of an injunction and stay of the Sec. 301 action, found ''reasonable cause to believe'' that the violation charged had been committed. This finding, however, is not dispositive of the issues before us. In the first place, the court was merely ruling on the propriety of preliminary relief. Second, the court viewed the issue before it as a pure question of law; and it premised its determination of the ''reasonable cause'' issue on whether the theory of the complaint issued by the Regional Director was ''not insubstantial and frivolous.'' Id. at 1561. This leaves open the question, to be decided by the Board on a full record, whether the theory of the complaint best comports with the congressional policies embodied in the Act.

from the association. The judge also found that the Chapter was not a party to the collective-bargaining agreement, but only an agent for those contractors who had signed letters of assent. He reasoned that, accordingly, the effect of the provisions in issue was not confined to the parties to the agreement, further supporting the finding of an 8(e) violation. The judge rejected any defense based on preservation of work traditionally performed by unit employees.

Regarding the 8(b)(4)(ii)(A) violation, the judge concluded that the Union's filing and pursuit of the grievance, which asked not only that the Chapter cease and desist from the grieved activities, but that it pay damages, was a coercive attempt to enforce an unlawful 8(e) provision. He also found that the CIR decision and the Union's threat to seek court enforcement of it constituted violations of Section 8(b)(4)(ii)(A).

Finally, the judge found that the Union had violated Section 8(b)(1)(A) and (2) in that its pursuit of the grievance was prompted by an unlawful and discriminatory objective rather than by genuine concern over the merits of the grievance or the integrity of the collective-bargaining agreement. He determined that those employees who had chosen to remain nonunion suffered discrimination based on that status in that they were precluded from receiving job referrals through the Union's hiring hall, and are now precluded from referral through the Chapter's program, as a result of the CIR decision. Apprentices face the same dilemma. Thus, he concluded, they are coerced into joining the Union, which holds the key to employment.[3]

### C. *The Position of the Parties*

The Union excepts to the judge's decision, arguing that there can be no unfair labor practice predicated on its pursuit of a meritorious grievance pursuant to a lawful contract clause. It asserts that in pursuing the grievance, it had lawful primary objectives, such as preserving work for its own members and protecting the objectives of contract clauses which bar the Chapter's operation of a competing hiring hall and apprenticeship program. The Union contends that both the employees and their bargaining agent have a primary interest in maintaining the integrity of their bargained-for programs and that the CIR was correct in finding that the basic purposes of the parties' agreement are undermined when one party acts in conflict with its terms.

In response, the General Counsel cites evidence that the Chapter's nonunion contractor members will withdraw from membership if the nonunion services are not resumed as clear proof of the cease-doing-business effect of the Union's actions. He asserts that work preservation is not a defense available to the Union under these circumstances, because the Union is actually attempting either to organize the nonunion firms or to frustrate their business operations by making it impossible for them to find qualified workers. This objective, the General Counsel contends, is inconsistent with merely protecting the jobsite work of unit employees because it is aimed instead at benefiting union members generally, an impermissible secondary purpose.

The General Counsel also argues that the Chapter's role under the contract is clearly an administrative one, for the benefit of its union signatory members, and thus, the CIR cannot impose on it a commitment not to do business with its other members. The commitment to exclusivity here, he contends, is solely that of the signatory employers to use the Union's hiring hall as their source of employees, and not a commitment by their agent as to the conduct of its other business relationships.[4]

The International Brotherhood of Electrical Workers, AFL–CIO, and the National Electrical Contractors Association are joint amici curiae in this case in light of their interest in the legal status of decisions issued by their joint body, the CIR. They assert that the CIR's decision was entirely based on colorable contract claims by the Union, which was lawfully seeking to preserve not just the integrity of its bargained-for hiring hall and apprenticeship program, but also the employment opportunities within the bargaining unit. The Union sought to prevent the erosion of its finite pool of available skilled workers, as well as to prevent injury to the services on which unionized contractors rely. These are lawful primary objectives, they argue, and therefore, the grievance cannot be regarded as an attempt to convert provisions of the collective-bargaining agreement into unlawful ''hot cargo'' provisions, in violation of Section 8(e).

The amici further argue that the Union's effort to protect the viability of the hiring hall from the Chapter's operation of a competing referral service reflects interests that Congress sought to protect when, in the Labor-Management Reporting and Disclosure Act of 1959, it enacted provisions relating to the construction industry in Section 8(e) and 8(f). In particular, they point to the history of Section 8(f), which permits the execution of collective-bargaining agreements providing for the operation of nondiscriminatory hiring halls, like the one to which the Chapter agreed here, that serve as the exclusive source of referrals for employers bound to the agreements.

[3] The judge reached this conclusion after making the finding that ''employees who have chosen to remain nonunion'' are ''obviously precluded from job referrals through the union hiring hall'' because of their nonunion status.

[4] In its brief, the Chapter makes essentially the same arguments as those made by the General Counsel.

D. *Analysis*

The issue for decision is both narrow and novel: whether a union violates Section 8(e) of the Act by submitting to arbitration a contractual grievance seeking to bar the practice, by an employer association which has signed the collective-bargaining agreement on behalf of its unionized members, of providing an employment referral service and apprenticeship program for its nonunion members, when these operations threaten to undermine the hiring hall and apprenticeship programs established in the collective-bargaining agreement.[5] We find for the following reasons that it does not.

We agree with the General Counsel and the Charging Party that the parties' agreement, as interpreted by the CIR, falls within the literal terms of Section 8(e), insofar as it would require the Chapter to cease offering a hiring hall and apprenticeship program to its nonunion members. But in deciding whether the existence of that objective requires a finding that the contract clauses as construed in the grievance violate Section 8(e), we should avoid an approach that takes no account of the contractual context and the relationships of all those affected. See *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 619 (1967) (finding that while conduct may come within a literal reading of Section 8(e), that is not the end of the analysis). Section 8(e), like Section 8(b)(4), ''could not be literally construed; otherwise it would ban most strikes [and agreements] historically considered to be lawful, so-called primary activity.'' *Electrical Workers UE Local 761 v. NLRB*, 366 U.S. 667, 672 (1961). And primary activity is protected even though it may seriously affect neutral third parties. *NLRB v. Operating Engineers Local 825*, 400 U.S. 297, 303–304 (1971). As the Board observed nearly two decades ago, in *Operating Engineers Local 12 (Griffith Co.)*, 212 NLRB 343 (1974), enf. denied 545 F.2d 1194 (9th Cir.), cert. denied 434 U.S. 854 (1977):

> It is by now well established that [not] every bargaining contract with a ''cease doing business'' objective [that comes] literally within the proscription of Section 8(e) of the Act, is . . . necessarily unlawful. The Board and the courts have held that a union may lawfully require a contracting employer to cease or refrain from doing business with another employer if the union's objective properly falls within certain carefully delineated exceptions, such as ''work preservation'' and maintenance of ''union standards.''

Id. at 343–344 (footnotes omitted).[6]

Although we do not agree with the Union that the object of its grievance in this case was true ''work preservation,'' we do agree that, under all the circumstances, we should recognize a ''carefully delineated'' exception for its pressing of the grievance under the circumstances here, without doing violence to the congressional intent embodied in Section 8(e).

As summarized in *National Woodwork*, supra,[7] the legislative history of Section 8(e) indicates that Congress was particularly concerned about abuses by the Teamsters of clauses that ''obligated neutral employers not to do business with other employers involved in labor disputes with the union''—typically, clauses that obligated trucking companies not to handle the goods of other employers involved in disputes with the Teamsters to which the trucking companies were not parties. What is at issue here, however, is not truly analogous to the clauses which Congress sought to address.

The concern motivating the Union, which was at the focus of the dispute manifested in the grievance, was protection of the contractually established hiring hall and apprenticeship system. The Chapter, whose conduct the Union sought to proscribe through its grievance, was not a ''neutral'' with respect to that concern. It was, in fact, the signatory to the collective-bargaining agreement in which the hiring hall and apprenticeship system were established. Whether we characterize the Chapter as an independent party to the agreement, or merely the agent through which employers have negotiated and executed the agreement, the fact remains that the Union could reasonably expect the Chapter not to take action directly undermining this provision in an agreement to which it had put its name. We decline to read Section 8(e) to preclude the actions taken by the Union in this case when those expectations were frustrated.

We note that the Chapter was itself operating the rival hiring hall and apprenticeship system. This is not a case in which a related entity of a contract signatory

[5] The 8(b)(4)(ii)(A) allegation rises or falls on the resolution of the 8(e) issue because the complaint allegation under the former subsection charges coercion with an object of forcing the employer into an agreement prohibited by Sec. 8(e).

Findings of violations on the basis of the 8(b)(1)(A) and (2) allegations similarly depend on our conclusion with regard to Sec. 8(e), because if we find that the Union's actions were entirely consistent with lawful primary objectives, then there is no basis for finding the discriminatory or otherwise unlawful intent proscribed by those sections. With respect to the judge's finding that employees who were not members of the Union would be ''precluded from referrals'' through the Union's hiring hall, we note that the agreement under which the hiring hall operated required it to make referrals on a nondiscriminatory basis and that there was no evidence or allegation that any particular employee was ever refused a referral on the basis of a lack of union membership. Of course, even employees who work under agreements containing union-security clauses may not lawfully be required by those clauses to be a full member of the union. See *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963).

[6] The court of appeals did not dispute this general proposition but rather found that the particular contractual provisions at issue in that case had unlawful secondary motives because they were aimed at pressuring one set of employers in order to resolve a dispute between the union and certain other employers (those who were delinquent in their payments to the multiemployer trust funds).

[7] 386 U.S. at 636.

independently carries on operations which a union challenges as harmful to its interests. Similarly, this is not a case in which the Chapter is being pressured with respect to disputes between the Union and the Chapter's nonunion members. There was no suggestion either in the grievance or otherwise that the Union would have dropped its grievance if any of the nonunion Chapter members hired employees who were members of the Union or agreed to sign the collective-bargaining agreement.

Given the way in which the construction industry is organized, the Union could reasonably believe that the Chapter's operation of parallel job referral and apprenticeship systems for nonunion employers threatened the viability of the contractually established systems. As Congress recognized in enacting the special provisions for the construction industry in Section 8(f), employees in that industry are typically not tied indefinitely to any single employer, but work from job to job for different employers.[8] A great number of skilled workers in the industry ''constitute a pool of such help centered around their appropriate craft union,'' and employers who sign collective-bargaining agreements with those unions gain access to that pool through the contractual referral system.[9] Of course, since exclusive hiring halls must be operated in a nondiscriminatory fashion, the pool from which referrals would be made to signatory employers would likely include both union members and employees who did not belong to the Union.[10] Whatever the membership characteristics of the pool, however, in order to live up to the responsibilities placed on it as the ''exclusive'' source of referrals to employers bound by the agreement, the Union would need to have an ample supply of workers available.

The rival hiring hall and referral system established by the Chapter for its members who were not union employers could be expected to draw employees from the limited pool of skilled workers and therefore undermine the ability of the Union to maintain an available labor supply to meet the needs of the employers who were bound by the collective-bargaining agreement. Whether or not the CIR, in finding merit to the Union's grievance, correctly concluded that the Chapter's establishment of the rival programs violated specific articles of the collective-bargaining agreement, the fact remains that the grievance was sufficiently related to legitimate concerns about the effects of direct actions of the Chapter on lawful union interests protected by the agreement that it cannot be condemned as an effort ''tactically calculated to satisfy union objectives elsewhere.''[11] It did not focus on the labor relations between the Chapter's nonunion employer-members and their employees. The Chapter's nonunion employer-members were free to hire employees on whatever terms they wished, union or nonunion.[12] As explained above, the grievance focused on maintaining the skilled employee pool available for referral under the agreement. The employees enrolled in the apprenticeship programs under the agreement and working for employers under the agreement had a common interest in the stability of that arrangement.[13]

We are particularly reluctant to find that the Union's efforts to protect its hiring hall arrangements violate Section 8(e) in view of the unique statutory treatment afforded such arrangements in the Act. By adding Section 8(f) to the Act, Congress specifically approved of the use of hiring halls in the building and construction industry—notwithstanding the fact that an exclusive hiring hall agreement plainly restricts a signatory employer's ability to ''do business'' with alternative referral services. See Senate Committee Print on the Labor-Management Reporting and Disclosure Act of 1959 (1 Leg. Hist. 967 (LMRDA 1959)) (''it will not be an unfair labor practice for a union and an employer, engaged primarily in the building industry to sign an agreement because . . . (3) such agreement requires the employer to notify the union of a need for craftsmen and gives the union an opportunity to refer such craftsmen for employment . . .'').

There is no contention in this case that the Union would violate Section 8(e) by seeking to prevent signatory employers from going outside the hiring hall if the Union had qualified individuals available for work.[14] As noted above, it would exalt form over substance to find that the Chapter could indirectly achieve the same result by establishing a competing hiring hall in the same geographic area, thereby reducing the number of skilled employees for the Union to refer and increasing the likelihood that signatory employers would go outside the Union's hiring hall to find qualified employees. Under these circumstances, we find that the Union's efforts in this case to prevent its hiring hall from being undermined by the Chapter's competing hiring hall do not violate Section 8(e).

[8] S. Rep. No. 187, 86th Cong. 1st Sess. 28 (1959), reprinted in 1 Leg. Hist. 424 (LMRDA 1959).

[9] Ibid.

[10] See fn. 5, supra.

[11] *National Woodwork,* supra at 644.

[12] See fn. 7, supra.

[13] See *Operating Engineers Local 12 (Griffith Co.),* supra (in finding no unlawful secondary objective in clause that required employer-members in multi-employer unit to cease doing business with other member employers during periods in which the latter were delinquent in their contributions to joint trust funds, Board reasoned there was a common interest of employees of all the employers in the stability of the trust funds that covered them all). Compare *Painters Local 36 (Stewart Construction),* 278 NLRB 1012, 1015 (1986) (distinguishing Griffith in finding unlawful a clause that required boycott of an employer to secure wage and benefit payments for the employees of another employer). As already noted (fn. 6, supra), the court of appeals did not agree that the delinquency provision was lawful; but the basis of its holding—that the clause was aimed at resolving the Union's disputes with the boycotted employers—does not apply in this case, where the Union is not seeking recognition from the Chapter's nonunion members.

[14] The General Counsel concedes that ''this was a lawful hiring hall as structured.''

The difference we have recognized here, between unlawful secondary objectives and the cease-doing-business objective focused on the operation of rival programs to those established by the collective-bargaining agreement, may well be characterized as a fine distinction; but as the Supreme Court long ago observed, '''[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task.'''[15]

## ORDER

The complaint is dismissed.

[15] *National Woodwork*, supra, 386 U.S. at 645, quoting *Electrical Workers UE Local 761 v. NLRB*, 366 U.S. 667, 674 (1961).

*James C. Sand, Esq.*, for the General Counsel.
*Hugh Hafer* and *Cheryl A. French, Esqs. (Hafer, Price, Rinehart & Schwerin)*, for the Respondent.
*Robert Fried* and *Mark R. Thierman, Esqs. (Thierman, Cook, Brown & Mason)*, of San Francisco, California, for the Charging Party.
*John A. McGuinn* and *Gary L. Lieber, Esqs. (Porter, Wright, Morris & Arthur)*, for the National Electrical Contractors Association.
*Laurence J. Cohen* and *Richard M. Resnick, Esqs. (Sherman, Dunn, Cohen Leifer & Counts, P.C.)*, for the International Brotherhood of Electrical Workers, AFL–CIO, Amici Curiae.

## DECISION

### STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Seattle, Washington, on December 1 and 2, 1988,[1] pursuant to an order consolidating cases, consolidated complaint, and notice of hearing issued by the Regional Director for the National Labor Relations Board for Region 19 on October 14 and which is based on charges filed by Puget Sound Chapter, National Electrical Contractors Association (Chapter or Charging Party) on July 26. The complaint alleges that International Brotherhood of Electrical Workers, Local Union No. 46, AFL–CIO (Respondent) has engaged in certain violations of Sections 8(e), 8(b)(1)(A), 8(b)(2), and 8(b)(4)(ii)(A) of the National Labor Relations Act (the Act).[2]

### Primary Issue

Whether Respondent violated various provisions of the Act listed above, by submitting first to Chapter, then after rejection, to the Council on Industrial Relations for binding arbitration, a grievance objecting to Chapter's practice of dispatching both inside wireman job applicants and apprentice trainees to Chapter's nonunion firm members who requested the service, and after the grievance was ultimately found to have merit, Chapter was ordered to cease and desist from operating the services described above on the grounds they violated the applicable collective-bargaining agreement now expired and a successor agreement.

All parties were given a full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel, Charging Party, and Amici Curiae.[3]

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE EMPLOYERS

General Counsel offered a written stipulation which reads as follows:

> 1. The following employers each have made sales of services within the state of Washington within the past twelve months, which period is representative of their operations generally, valued at in excess of $50,000, and, during the same period have also made sales of services in other states valued at in excess of $50,000:
>
> Burke Electric
> Power City Electric
> Superior Electric Service
> Northwest Electric
> Service Electric
>
> 2. The following employers each have purchased goods valued at in excess of $50,000 directly from suppliers located outside the State of Washington for shipment to said employers' respective places of business or jobsites within the State of Washington within the past twelve months, which period is representative of each such employer's business operations generally:
>
> BURKE ELECTRIC
> POWER CITY ELECTRIC
> SIGNAL ELECTRIC
> SUPERIOR ELECTRIC
> UDL ELECTRIC
> NOLET ELECTRIC
> COLLINS ELECTRIC
> NORTHWEST ELECTRIC
> EVERGREEN ELECTRIC
> SERVICE ELECTRIC
>
> 3. The following employers, during the past twelve months, which period is representative of their respective operations generally, each purchased goods valued at in excess of $50,000 for delivery to their respective places of business or jobsites within the state of Washington directly from suppliers outside said state or from suppliers within said state which themselves had purchased such goods directly from suppliers outside said state:

[1] All dates refer to 1988 unless otherwise indicated.

[2] On November 16, Regional Director of Region 19 signed an order approving withdrawal of charge in Case 19–CB–6369 and dismissing allegations in par. 17 of the consolidated complaint alleging a violation of Sec. 8(b)(3) of the Act (G.C. Exh. 1(r)). In addition at hearing, General Counsel withdrew the allegations in par. 16 of the complaint alleging a violation of Sec. 8(b)(1)(B) of the Act.

[3] In an unusual, if not unprecedented procedure, Respondent presented at hearing a document entitled ''Motion and Memorandum of International Brotherhood of Electrical Workers, AFL–CIO, and the National Electrical Contractors Association for Leave to File a Joint Brief as *Amici Curiae*.'' (G.C. Exh. 1v.) I granted this motion and its brief has been received and considered with the other briefs of the parties.

TRIG ELECTRIC
FOX ELECTRIC

This stipulation has been signed and entered into this 1st Day of December, 1988, at Seattle, Washington.

Hugh Hafer, Counsel for IBEW local 46

/s/ Robert Fried, Counsel for Puget Sound Chapter

/s/ James Sand, Counsel for General Counsel

[G.C. Exh. 22.]

Although Respondent's attorney did not sign the document, he orally agreed to its contents at hearing. (Tr. p. 11.) Representatives of Power City Electric, Collins Electric and Superior Electric Service Co. testified at hearing and established their nonunion status and membership in chapter.

Accordingly based on the stipulation recited above and the testimony of three nonunion contractors, I find that Power City Electric, Collins Electric, and Superior Electric Service Co. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

Respondent, International Brotherhood of Electrical Workers, Local Union, No. 46, AFL–CIO admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *The Facts*[4]

#### 1. Background

Chapter, a Washington State nonprofit corporation, is one of approximately 133 chapters which constitute the National Electrical Contractors Association (NECA). Chapter's By-Laws and Code of Ethics recite its objectives which include:

OBJECTIVE

(1) To arrange for and promote meetings of Electrical Contractors who are engaged in business in this area, and provide them with an effective voice.

(2) To promote harmonious labor-management relations and provide for the orderly settlement of labor disputes through the Council on Industrial Relations and otherwise.

(3) To promote and join in the operation of programs of practical training and related instruction for apprentices, and advance training for journeymen in the electrical trade in this area.

. . . .

(10) To increase and stabilize the membership of National Electrical Contractors Association, Inc., and to cooperate in general with said National Association, conducting all activities in accord with its Constitution.

. . . .

(12) To speak for the electrical contracting industry as a whole and represent its interests before legislative assemblies, governmental agencies and other bodies.

[G.C. Exh 2.]

With a total membership of approximately 70 contractors, Chapter is about evenly divided with 50 percent union or signatory and 50 percent nonunion or nonsignatory. A member of Chapter or nonmember may signify its willingness to be bound by the terms of a collective-bargaining agreement by executing a Letter of Assent A or B (G.C. Exhs. 4, 5).[5] Chapter, itself, does not directly engage in any electrical contracting nor does it employ electricians to perform electrical craft work. In return for the payment of annual dues amounting to $475 and additional fees based on a formula of 18 cents for each electrician hour worked,[6] union and nonunion members receive a variety of services from Chapter. For example, for its union members, which constitute a multiemployer bargaining unit, Chapter negotiates, administers and polices various collective-bargaining agreements. One of these agreements, effective between June 30, 1986 and May 31, was received into evidence (G.C. Exh 3). The agreement covers all inside electrical construction work within the territorial jurisdiction of Respondent.

For its nonunion members, Chapter provided until October 13, a two-prong referral system for inside wiremen job applicants and for apprentice trainees. The referral program constituted about 70 to 75 percent of the total service provided by Chapter to its nonunion members. As a result of a grievance filed by Respondent as more fully explained below, the referral system is now terminated.

The current executive director of Chapter is Steve Washburn, a lengthy witness at hearing. He reports to a Board of Directors elected by the membership. As the geographical jurisdiction of each NECA Chapter is roughly equivalent to that of a corresponding IBEW local, Chapter and Respondent are responsible for the same area in and around the city of Seattle, Washington. Washburn's counterpart in Respondent is David Jordan, Respondent's business manager and financial secretary, and also a witness at hearing.

Respondent has a membership between 3200 and 3500 of which approximately 1600 are inside wiremen, the tradesmen affected by the issues in this case. The others are assigned to various other job units such as marine ship yard worker.

#### 2. The grievance

For a long period of time, Respondent's officials had disapproved of Chapter's nonunion referral program. For several years prior to May 31, the date of filing of a formal grievance, both Jordan and Henry McGuire, a business representative for Respondent, made various verbal objections to Chapter's practice. During this period of time, Respondent operated its own hiring hall referral system by which it referred its members or members of other locals to union contractors. Because union members generally earned higher wages and more generous fringe benefits, as set forth in the collective-bargaining agreement, Respondent viewed the competing nonunion referral system as a threat tending to encourage contractors to become nonunion so as to lower their labor costs substantially. In late January or early February, Respondent officials Jordan and McGuire met with Washburn

[4] Errors in transcript are noted and corrected.

[5] Longstanding Board precedent holds that a signer of an IBEW Letter of Assent A becomes part of a multiemployer bargaining group. *Vincent Electric Co.*, 281 NLRB 903 (1986).

[6] A portion of the money collected by Chapter from its members is sent to NECA.

and his associates and offered to refer union members out of Respondent's hiring hall to nonunion contractors. The purpose of the offer was to further Respondent's educational and organizational goals, and to blunt the effect of Chapter's nonunion referral system. However, Chapter officials rejected this proposal.

In any event, on May 31, Respondent filed a grievance pursuant to applicable provisions of the 1986–1988 labor agreement. (G.C. Exh 3.) In pertinent part, the grievance reads as follows:

> May 31, 1988
>
> Puget Sound Chapter of NECA
> Mr. Steve Washburn
> 711 6th Avenue, North
> Seattle, WA 98109
>
> Subject: Grievance of IBEW Local #46 against Puget Sound Chapter of NECA
>
> Dear Mr. Washburn:
>
> The Puget Sound Chapter of NECA has violated the labor agreement with respect to the dispatch of workers involved in inside electrical construction work and the training of Journeymen and others within the jurisdiction of IBEW Local #46.
>
> Our Agreement starts out stating that the agreement is an, ''Agreement by and between the Puget Sound Chapter, National Electrical Contractors Association, and Local Union No. 46, International Brotherhood of Electrical Workers. It shall apply to all firms who sign a letter of assent to be bound by this agreement. As used hereinafter in this agreement, the term ''Association'' shall mean the Puget Sound Chapter, National Electrical Contractors Association and the term ''Union'' shall mean Local Union No. 46, I.B.E.W. The term ''Employer'' shall mean an individual firm who has been recognized by an assent to this agreement.''
>
> Letters of Assent may be signed by firms which will bind such firms to the terms and conditions of the NECA/IBEW Agreement and restates the fact that the IBEW and NECA are the principle parties to the Agreement. Under the Section titled ''Basic Principles'' the Agreement states, ''This agreement shall cover all inside electrical construction work and workers within the territorial jurisdiction of Local Union No. 46 of the International Brotherhood of Electrical Workers.'' Clearly, all employees doing electrical construction work are covered by this Agreement.
>
> In Article I, Section 1.03 the Agreement states, ''The agreement shall be subject to change or supplement at any time by mutual consent of the parties hereto. Any such change or supplement agreed upon shall be reduced to writing signed by the parties hereto and submitted to the International Office of the IBEW and the National Office of the NECA for approval, the same as this agreement. Once again, it is clearly stated who the principle parties are to this Agreement.
>
> In Article V, Section 5.01 the Agreement states, ''In the interest of maintaining efficient system of production in the industry providing for an orderly procedure of referral of applicants for employment preserving the legitimate interests of the employees in their employment status within the area and of eliminating discrimination in employment because of membership or nonmembership in the Union, the parties hereto agree to the following system of referral of applicants for employment.'' Section 5.02 states, ''The Union shall be the sole and exclusive source of referral of applicants for employment.
>
> The Puget Sound Chapter of NECA has violated the agreement by referring applicants for employment in violation of Article V, Section 5.01 through 5.21.
>
> Also, the agreement has been violated with respect to apprenticeship. On September 30, 1987 the parties agreed to the new National NECA and IBEW standard fifth year apprenticeship language (See copy attached.) The agreement to adopt the language was made by the parties as specified in Article I, Section 1.03 of the agreement and was, in fact, made between the Puget Sound Chapter of NECA and IBEW Local 46.
>
> The new language inserted in our Article III, Section 3.12 states, ''There shall be a Joint Apprenticeship and Training Committee having four members representing the Puget Sound Chapter of NECA and an equal number of four members representing Local 46 of the IBEW. This committee shall make local standards in conformity with the National Apprenticeship and Training Standards for the Electrical Contracting Industry governing the selection, qualifications, education, and training of Journeymen and others. The local standards will be promptly agreed upon by the parties to this Agreement and shall be registered with the National Joint Apprenticeship and Training Committee and the appropriate State or Federal Apprenticeship Registration Agency.'' Also, Section 3.19 states, ''The parties to this Agreement shall enter into a Joint Apprenticeship and Training Trust Fund Agreement which shall conform to Section 302 of the Labor-Management Relations Act of 1947, as amended.''
>
> The JATC is set up between the Puget Sound Chapter of NECA and IBEW Local 46 and these parties are signatory and bound to the provisions under the JATC Sections of the Labor Agreement.
>
> Article III, Section 3.14(a) states, ''The Committee shall supervise all matters involving apprenticeship training in conformity with the provisions of this Agreement and the registered local Apprenticeship Standards. In case of a deadlock, the matter in dispute shall be referred to the parties to this Agreement for settlement. Any proposed change in this Agreement pertaining to Apprenticeship and Training should first be considered by the committee for their recommendation before being acted upon by the parties to this Agreement.'' It is clearly a matter of fact that the Puget Sound Chapter of NECA has established a nonunion apprenticeship program and has been involved in all matters involving apprenticeship training and referral outside of the purview of the agreed to joint oversight committee, the JATC in direct violation of the Agreement.
>
> In Article V, Section 5.20 the Agreement states, ''Apprentices shall be hired and transferred in accordance with the apprenticeship provisions of the agreement between the parties.'' It is clear, that NECA has

hired and transferred in direct violation of the Agreement.

[G.C. Exh. 6.]

As relief, Respondent sought inter alia, damages and a cease-and-desist order against Chapter's referral practices.

On June 3, Chapter replied to the grievance as follows:

June 3, 1988

Hank McGuire
Business Representative
LU 46, IBEW
2700 First Ave
Seattle, WA 98121

RE: Response to your letter dated May 31, 1988

Dear Hank:

Please be advised that the Puget Sound Chapter, NECA is not bound by the terms and conditions as delineated in the Labor Agreement. Please refer to page one of the Labor Agreements where it states in part:

''It shall apply to all firms who sign a letter to be bound by this agreement.''

In addition the same paragraph states in part:

''The term 'employer' shall mean an individual firm who has been recognized by an assent to this agreement.''

In your letter dated May 31, 1988 you discuss the clause under ''Basic Principles.'' Notice the word throughout the clause, ''employer,'' then read the definition of the word employer as delineated above.

Your fallacious conclusion may be referred to as an ''Argumentum Ad Ighoratiam.'' NECA will not nor can participate in such a charade. A similar but reverse situation would be for NECA to file a grievance against LU 46, IBEW for IBEW electricians ''moonlighting'' or for IBEW electricians working for Merit Shops with their card in their shoe. Sending such letters back and forth does not respond to market conditions.

I trust the discussion of filing grievances against each other has ended.

Sincerely,

/s/ Steve R. Washburn

cc: Randy Burke
Gary Lane
Jim Mackey

[G.C. Exh. 7.]

On June 16, Chapter supplemented its response by contending that Respondent's 30-day filing period for submitting the grievance had expired over 3 years ago when Chapter had begun its nonunion referral program. (G.C. Exh. 9.)

On July 12, Respondent submitted a letter to Chapter which reads as follows:

July 12, 1988

Steve Washburn, Chapter Manager
N.E.C.A.
711 6th Avenue, North
Seattle, WA 98109

Dear Mr. Washburn:

With respect to the grievance concerning the referral of applicants for employment and training and referral of apprentices by the Puget Sound Chapter of NECA, we wish to make the following proposal in the interest of industrial peace and prosperity. We will drop our demands for any and all damages if the Chapter will immediately cease and desist from all the grieved activities to our satisfaction.

We do not wish to pursue this all the way to the CIR. However, if the Chapter continues to engage in the grieved activities, we have no alternative but to proceed to the Council and ask for full damages.

Attached is a settlement agreement for your consideration.

Sincerely,

/s/HANK McGuire

Hank McGuire, Business Representative
Local Union No. 46, I.B.E.W.

HM:dr
opeiu#8 Afl–cio

encl.

cc: John J. Barry, President, I.B.E.W.,
International Office
S.R. McCann, Vice-President, I.B.E.W.,
Ninth District
Bill Grostick, International Rep., I.B.E.W.,
Ninth District
Mike Lucas, Organizer, I.B.E.W.,
International Office
Emerson Hamilton, President, N.E.C.A.
Dan McPeak, Director of N.E.C.A.
John M. Grau, Executive Vice-President,
National N.E.C.A.
Bill Birkett, District Rep, S. Colorado Chapter
of N.E.C.A.

[G.C. Exh. 12.]

The next day, the parties to the grievance met but were unable to reach agreement on the proposals contained in the July 12 letter above. (G.C. Exh. 14.)

On August 2, Respondent submitted its grievance to the Council on Industrial Relations for the Electrical Contracting Industry (CIR), a nationwide contractual dispute resolution forum established by NECA and IBEW. (G.C. Exhs. 15a–c.)

On August 16, the CIR issued its decision finding as follows:

1. through 6. The Council finds that the contract language clearly names the Puget Sound Chapter, NECA, as party to the collective-bargaining agreement, which is signed for the Chapter by its representative. References in the agreement to ''The Parties'' are defined as Local Union 46, IBEW, and the Puget Sound Chapter, NECA. The agreement specifically states it is ''by and between the Puget Sound Chapter, NECA, and Local Union 46, IBEW.''

The Council further finds that the Puget Sound Chapter, NECA, through its agent(s), has clearly violated the basic principles which define the spirit and intent of the Inside Collective Bargaining Agreement be-

tween the Chapter and the Local Union. Parties to an agreement should not enter into a contract and subsequently work in conflict with its terms. More specifically, the areas of the agreement where the intent was violated by the Chapter include Article III in the Chapter's unilateral support of, and participation in, an apprenticeship program other than that defined in the aforementioned Labor Agreement. By assisting and participating in a separate apprenticeship program, the Chapter is obviously competing with the agreed-upon JATC Program for the available pool of applicants, thereby creating a clear conflict of interest.

The Chapter has violated the intent of Article V of the agreement by their administration of a job referral procedure other than that provided for in their collective-bargaining agreement with Local Union 46, IBEW. Local 46 has presented evidence that the Chapter has solicited job applicants on the Local 46 Referral List for referral to jobs for other than signatory employers. Since the Local 46 exclusive referral system is available to both Union and nonunion electricians, the Chapter's participation in a separate referral system clearly undermines the availability of electricians for the Local Union to refer through the agreed-upon referral system thereby creating a conflict of interest by the Chapter.

Therefore, the Council directs the Puget Sound Chapter, NECA, and its agent(s) to immediately cease and desist from engaging in any and all activities which are in conflict with the spirit and intent of their collective-bargaining agreement with Local 46, IBEW.

Unanimously Adopted:
Washngton, D.C.
August 16, 1988
[G.C. Exh. 16.]

Meanwhile, a new collective-bargaining agreement has by now been negotiated between Chapter and Respondent (G.C. Exh. 17). While not yet—as of the date of close of hearing—approved by IBEW, both sides are governing themselves as though the successor agreement is in full force and effect. The new agreement does not provide for binding arbitration by the CIR as does the old agreement. In all other particulars, relevant and material provisions appear to remain the same.

When Chapter did not immediately terminate its job applicant and apprentice referral programs, both Jordan and McGuire threatened to seek court enforcement of the CIR decision. On or about September 14, Chapter decided to comply with the decision (G.C. Exh. 23). On September 16, Respondent was notified of the decision (G.C. Exh. 19). By October 13, Chapter had terminated both programs and terminated an employee named Gwen Tuthill, the coordinator for the Manpower Assistance Program, under which the apprentices had been referred for training.

As part of the closing down process, Washburn also transferred without cost, Chapter's computers and software used in the defunct referral programs to Associates Building Contractors (ABC), another trade group. This transaction included a verbal understanding between Chapter and ABC that at some unspecified future date, ABC would return to Chapter the computers, but not the software containing among other materials, the names of 1500 to 1700 persons on Chapter's nonunion out-of-work list.

Chapter and ABC are not connected to each other. However, the latter apparently intends to set up a system similar to that which Chapter shut down. No credible evidence was presented to show such a system has actually begun to function or will necessarily function in the future.

After Chapter shut down its referral system, it continued to receive as of late October, up to 10 calls per day from job applicants wishing to register or re-register on Chapter's out-of-work list for nonunion referrals. Washburn told his staff to explain to these callers why the referral system was no longer operating.

According to Washburn, before the CIR decision, his membership of nonunion contractors had been increasing. After Washburn circulated a written notice in late September or early October, stating that the referral system was to be shut down, he received written notice from about 10 contractors that they were terminating membership either immediately or within 30 days.

At hearing, representatives of three nonunion contractors testified regarding their membership in Chapter and the effect of the discontinued job applicant and apprentice training programs on their plans to continue membership. Witnesses David Defeyter on behalf of Power City Electric, Robert Collins on behalf of Collins Electric Co., and James Donaldson, on behalf of Superior Electric Service Co., all gave similar testimony which I fully credit. They were dues paying, nonunion members of Chapter primarily to receive the benefits of the job referral and apprentice training programs. Subsequent to the termination of the programs, they were required to use newspaper want ads, word-of-mouth, or other methods to obtain employees. These other methods involved extra expense and were otherwise less effective and satisfactory than Chapter's now terminated programs.

The witnesses indicated that they had not yet terminated membership but rather continued to pay dues and to a certain extent participate in the affairs of Chapter. Their reluctance to sever membership is based on the uncertainty caused by the instant case and other litigation referred to below. These legal actions, even when considered with the likelihood of lengthy appeals and related litigation are for now, sufficient to encourage the three contractors to continue membership. However, I find the threat to withdraw from Chapter if the job applicant and apprentice training system is not revived is substantial and not speculative.

As a basis for my conclusion, I note the following: One contractor, Dwyer Electric Co., has in fact, terminated membership in Chapter due to the CIR decision (G.C. Exh. 23). Defeyter, representing Power City Electric Co., has withdrawn from NECA based on its national policy of not providing service to nonunion firms. Prior to August 16, Chapter obviously did not accept this national policy. Finally, as a matter of common sense and logic, if nonunion members are no longer receiving 70 to 75 percent of the services for which they are paying annual dues, it appears to follow naturally, they will eventually stop paying for that which they no longer receive.

3. The 10(l) injunction[7] and related litigation

On October 11, Chapter filed in U.S. District Court for the Western District of Washington an amended complaint against Respondent seeking vacation of the CIR award and damages. (C.P. Exh. 2.) Exhibit B to the complaint is an August 31 letter from John Dwyer, a representative of Dwyer Electric, Inc., to Washburn giving unequivocal notice that effective September 30, Dwyer Electric was terminating its membership and affiliation with Chapter due to the CIR decision.

Subsequent to this lawsuit, the NLRB, by its Regional Director, acting pursuant to Section 10(l) of the Act, petitioned the U.S. District Court for the Western District of Washington, for a preliminary injunction enjoining the enforcement of the CIR arbitration award. A memorandum opinion in that case authored by Chief U.S. District Judge Barbara J. Rothstein, and dated November 21, has been admitted into evidence in this case (C.P. Exh. 1). Based entirely on affidavits (Tr. pp. 371–372), the court's decision granted the Board's petition for a preliminary injunction on the grounds that the CIR's interpretation of the collective-bargaining agreement violates Section 8(e) of the Act.[8] The court then consolidated the Board's case with the earlier case filed by Chapter and stayed both cases pending a ruling by the NLRB.[9]

B. *Analysis and Conclusions*

1. Preliminary matters

a. *Respondent's motion to reopen record*

With its brief, Respondent filed a Motion to Reopen the Record in order to admit Respondent's Exhibits 18 and 19. Respondent submits with the Motion, an ''Affidavit of Kathleen Phair Barnard.'' The Affiant represents that she is an attorney in the office of Respondent's trial counsel, Hugh Hafer. Affiant, who did not participate in the hearing, also avers that she is familiar with the record of this case. She then purports to identify in conclusionary terms the two exhibits which are offered into evidence: Exhibit 18 purports to be a ''true and accurate copy of a letter received by the Secretary of the CIR seeking clarification of the decision of the CIR at issue in this proceeding, and the CIR decision responding to this letter and clarifying its award.'' Respondent's Exhibit 19 purports to be ''a true and accurate copy of a newsletter distributed by [Chapter], which states that Chapter's suspension from NECA has been suspended.''

No basis for affiant's characterizations of the exhibits is included. No discussions of relevancy or citations of authority are submitted. Both General Counsel and Charging Party object.

Section 102.35 of the Board's Rules and Regulations reads, in pertinent part:

> Duties and powers of administrative law judges . . . .
>
> . . . the administrative law judge shall have authority, with respect to cases assigned to him . . . (h) . . . to order hearings reopened . . . .

Unlike a subsequent section of the Board's Rules and Regulations, Section 102.48 (d)(1) dealing with the reopening of the record after the Board decision or order, Section 102.35 (h) does not include specific standards or guidelines determining how a motion like that submitted by Respondent should be evaluated. I conclude therefore that a decision on such motion is committed to the sound discretion of the administrative law judge. Cf. *NLRB v. Cutter Dodge*, 825 F.2d 1375, 1380 (9th Cir. 1987).

Based on Respondent's failure to show adequate foundation, and relevancy, I deny Respondent's motion to re-open the record and refuse the offer of Respondent's Exhibits 18 and 19.[10]

In further explanation of my decision, I note that hearing of this case occurred on December 1 and 2. The exchange of correspondence over the next two weeks as represented in Respondent's Exhibit 18 adds nothing to the case. In addition, the original CIR decision speaks for itself and does not require ''clarification'' for purposes of my deciding whether it violated Section 8(e) and other sections of the Act.

As to Respondent's Exhibit 19, this document relates to a dispute between Chapter and NECA. It is even less relevant than Respondent's Exhibit 18. I will discuss the entire issue in greater detail below in so far as it relates to Respondent's affirmative defense of intervening cause.

To the extent that Respondent has incorporated any discussion of the rejected exhibits in its brief, I will ignore the discussion.

b. *Respondent's motion for continuance*

Much was made at hearing of Respondent's motion for continuance for the purpose of subpoenaing in various electrical contractor members of Chapter, to explore whether they had terminated or had threatened to terminate membership in Chapter because of the CIR decision or for other reasons. Because this issue may well be addressed on appeal, it is prudent to discuss the matter briefly.

Section 102.43 of the Board's Rules and Regulations reads:

> Continuance and adjournment—In the discretion of the administrative law judge, the hearing may be continued from day to day, or adjourned to a later date . . . by the administrative law judge . . . .

Administrative law judge's discretion has been noted and repeatedly approved by the Board and courts. See, e.g., *Franks Flower Express*, 219 NLRB 149 (1975), enfd. mem. 529 F.2d 520 (5th Cir. 1976), and *NLRB v. Interboro Contractors*, 432 F.2d 854, 860–861 (2d Cir. 1970), cert. denied 402 U.S. 915 (1971).

[7] Sec. 10(l) of the Act provides district courts with the power to temporarily enjoin unfair labor practices that impinge on the public interest in the free flow of commerce (i.e., strikes and boycotts) *Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744 fn. 2 (9th Cir. 1988).

[8] Judicial opinions in collateral proceedings under Sec. 10(j) (or Sec. 10(l)) do not control the Board's dispositions of unfair labor practice charges. *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1186 fn. 3 (1986). Accordingly, the 10(l) injunction is noted for background only.

[9] Notwithstanding the decision of Chief Judge Rothstein, as of the hearing date of the instant case, Chapter had not decided whether it would resume its job applicant referral or its apprentice trainee programs.

[10] In accord with standard practice, the two rejected exhibits are placed in the rejected file and will be considered by the Board or reviewing court if appropriate.

Turning now to the instant case, I note the following factors which influenced my decision to deny Respondent's Motion: (1) Pursuant to Sections 102.95, 102.96, and 102.97 of the Board's Rules and Regulations, the Board instructs that a case in which a 10(l) injunction has been issued is entitled to expeditious processing. As noted in ''The Facts,'' a 10(l) injunction was issued in the instant case; (2) Respondent failed to request subpoenas duces tecum in a timely manner and to describe with sufficient specificity that relevant evidence which it expected to obtain. Hearing in the case had been continued once from November 17 to December 1 (G.C. Exh. 1m). Respondent was well versed in the issues based on the 10(l) injunction hearing. Moreover, it knew that General Counsel had specifically alleged in paragraph 15(b) of the complaint (G.C. Exh. 1k) that Dwyer Electric, Inc., had terminated its membership in Chapter because of the CIR decision. Yet Respondent did not even attempt to bring in an official of Dwyer to ascertain whether it did terminate membership in Chapter, and if so, whether it did for the reason alleged by the General Counsel.

The failure of Respondent to bring in Dwyer Electric representatives or to explain why he could not do so, casts doubt on the bona fides of any claim of prejudice. In fact, Respondent could point to no specific evidence that it needed to defend itself. Instead Respondent sought to engage in the classic ''fishing expedition'' in the hope—not even in the expectation—that something helpful might turn up. To support this conclusion, I need look no further than Respondent's cross-examination of the three contractors called by General Counsel. Respondent had a full opportunity to cross-examine these witnesses—who are representative of the other contractors—and so far as I am concerned, Respondent developed no information helpful to any aspect of its case.

In its discussion of this issue (Br. pp. 45–49), Respondent has failed to mention and discuss the fact that issuing the requested subpoenas would have required a continuance of indefinite duration while Respondent attempted to serve and to schedule the various contractors.

Respondent also contends (Br. p. 47) that it was entitled to test the veracity of the letters attributing contractors' withdrawals from Chapter to the CIR decision. Again, I am puzzled because Respondent's counsel himself noted during hearing:

> MR. HAFER: Exhibit 21, [letters from contractors] Your Honor, was identified verbally on the record and has not been marked and has not been offered.
>
> MR. SAND: That's right.
>
> [Tr. p. 368.]

Since the exhibit which Respondent now seeks to rebut was never offered or received, said exhibit will not be considered in arriving at a decision.

In light of the above, I reaffirm my decision that Respondent failed at hearing and fails again now to show why a continuance and issuance of subpoenas are warranted.

c. *Respondent's so-called intervening cause theory is not supported by credible evidence*

At all times material to this case, Chapter found itself in disagreement with NECA over Chapter's practice of providing services to its nonunion members. Respondent now contends that to the extent that Chapter has lost members, such losses are the result of the conflict between Chapter and NECA, rather than the result of the CIR decision issued as the result of Chapter's grievance. Accordingly, Respondent argues, it cannot be found to have violated Section 8(e) of the Act.

Because the record is devoid of evidentiary support for Respondent's theory, it is unnecessary to determine whether Respondent's affirmative defense, if proven, may constitute a valid defense to an 8(e) violation.[11]

I begin with NECA's long-range plan issued in October 1987, some 4 years after Chapter began its job applicant program for Chapter's nonunion members. This document reads in pertinent part:

> Based on the labor policy adopted by the vast majority of NECA members, labor relations services have been and are projected to be one of the foremost services desired by NECA members. To be effective at delivering these services requires the establishment and maintenance of harmonious relationships with the corresponding labor union including the commitment to support mutually desirable goals and programs. The promotion of such goals and programs will at times be in conflict with the interests of electrical contractors who are not signatory to union labor agreements.
>
> Accordingly, NECA cannot appropriately serve all interests of both signatory and nonsignatory electrical contractors. Until such time as the labor policy and labor relations interests of the majority of NECA's members change, it must place the interests of signatory contractors above those of nonsignatory contractors.
>
> NECA will not, therefore, provide services which are unique to the needs of nonsignatory contractors and which would conflict with the best interests of signatory electrical contractors. Further, NECA and its chapters should investigate the special business interests and labor policy of each applicant for membership, and if they are found to be outside the scope of the Association's services or in conflict with any of its policies, the applicant shall be appropriately advised concerning the Association's limitations in providing him a service and promoting his interests. [R. Exh. 1, p. 4.]

Following the issuance of the long-range plan, NECA officials sent various letters to Chapter objecting to its continuing policy of providing job applicant and apprentice training services to its nonunion members. (See, for example, R. Exh. 8, sub Exh. 27.)

[11] However, I note a frequent intervening cause offered by Respondents and uniformly rejected by the Board is reliance on advice of counsel. See *Medical Center at Bowling Green*, 268 NLRB 985, 986 fn. 3 (1984); *NLRB v. Hendel Mfg. Co.*, 483 F.2d 350, 353 (2d Cir. 1973).

On June 17, some 8 months after the long-range plan, and some 2 weeks after Respondent filed its grievance, NECA wrote a stronger letter to Chapter. It reads as follows:

June 17, 1988
Board of Directors
Puget Sound Chapter, NECA
711 Sixth Avenue
Seattle, Washington 98109

Gentlemen:

At each of its meetings over the past two years, the NECA Executive Committee has reviewed complaints and problems regarding the operations of the Puget Sound Chapter. We have specified some of these problems to you in past letters. In general, we find that there is dissatisfaction with your chapter operations being expressed by a number of your members, by potential members who refuse to join because of your policies, by the local union, and by your surrounding NECA chapters and other NECA chapters on the West Coast. Of particular concern is the disruption your operations and policies have created in the labor relations activities of your own chapter and of neighboring NECA chapters.

A number of these problems can be attributed to your support of nonunion apprenticeship programs in the State of Washington, your failure to grant proper autonomy and service to IBEW-employing electrical contractors, your repeated violations of the membership and jurisdictional provisions of the NECA Bylaws and your general operational philosophy which is out-of-phase with other NECA chapters and National policies. The Executive Committee believes that while these actions justify the removal of your chapter's charter of affiliation with NECA, we prefer that your chapter members address these issues directly and attempt to resolve them.

To remedy the problems that we have noted we recommend the following specific actions:

1. Union-employing electrical contractors must be given autonomy over their own contract negotiations and labor relations matters apart from the influence or control of nonunion electrical contractors or board of director members.

2. The chapter should support the NECA/IBEW Joint Apprenticeship Program in your area and the State of Washington and cease efforts to undermine this program by support of competing programs.

3. The chapter should honor its commitments under its collectively bargained labor agreements and discontinue operation of a nonbargained referral hall for electricians.

4. The chapter should work cooperatively with other NECA chapters in the state and region to advance common goals and interests.

5. The chapter and its agents must cease its labor relations representation and negotiations in areas assigned to other NECA chapters. The chapter must coordinate and cooperate its activities with other chapters on these matters.

6. Any electrical contractor eligible for membership and providing support to the chapter must become a member of the chapter and National, otherwise the granting of membership status and receipt of payments from that firm must cease.

7. The chapter must support the temporary membership provisions of the National Bylaws and direct all of its permanent members to provide support for other NECA chapters when traveling into their chapter jurisdictions.

8. The chapter shall conduct a meeting of all its members to discuss the issues presented in this letter and to determine their position in resolving these problems.

If after thorough discussion of these matters your chapter determines that it does not wish to change its current operations and policies we suggest that your chapter disaffiliate itself from NECA by relinquishing its charter. If there is disagreement within your chapter and you find that you cannot resolve your problems we offer our assistance in finding alternate solutions.

We request that a response to this letter be sent to us within forty-five days. By copy of this letter we also welcome direct comments from individual members of your chapter.

Sincerely,

/s/Emerson Hamilton President

/s/Bill Coburn Vice President, District 6

/s/John M. Grau Executive Vice President

cc: NECA Executive Committee
Puget Sound Chapter Members
District 6 NECA Chapter Presidents, Governors & Managers
Daniel J. McPeak

[R. Exh. 5A.]

This was answered by Chapter's letter [signed by Chapter's Board of Directors to NECA taking issue with many of the matters raised in the June 17 letter (R. Exh. 5b).

During the period from October 1987 to August 16, when the CIR decision was issued, certain facts cannot be ignored. First, neither Business Representative McGuire nor any other Respondent official complained to NECA about Chapter's practices before filing the grievance. I must assume the reason Respondent's officials did not complain was because they recognized as the evidence strongly suggests, that NECA lacked authority to impose its will on Chapter or any other chapter member of NECA. For the same reason, NECA never instituted legal action to force chapter to accept the provisions of NECA's long-range plan, or to impose a receivership or trusteeship on Chapter for the latter's continued defiance of NECA's policies.

Prior to May 31, the date the grievance was filed, NECA never directed Chapter to discontinue the job applicant or apprentice training programs. It wasn't until after the CIR award was issued that NECA undertook specific action against Chapter. Thus, during a meeting in October, officials of NECA advised Chapter that it was suspended—not for violating the long-range plan, not for ignoring NECA's letter recited above, but instead because Chapter filed charges with

the Board.[12] Apparently, NECA viewed this act as a form of noncompliance with the CIR award. When Washburn asked an NECA official to explain exactly what consequences flowed from the suspension, the official replied that since no Chapter had ever been suspended before, he didn't know. Apparently the ''suspension'' has now been lifted.

It is unnecessary to make findings regarding the nature of the legal relationship between Chapter and NECA. However, Washburn testified flatly that each chapter was autonomous and not subject to direct control by NECA. He also testified that many other Chapters of NECA around the country were providing services to nonunion members similar to those provided by Chapter. While interesting and unrebutted, none of this is particularly germane to the central issue in the case concerning whether Respondent violated Section 8(e) of the Act, an issue which I will address below.

When Chapter finally did close down its job applicant and apprentice training programs it did so to comply with the CIR decision and not to abide by any policy or directive of NECA.

Based on the above discussion, I reject entirely Respondent's argument in its brief (pp. 35–45). I find that the nonunion contractors who terminated membership in Chapter or threatened to, depending on the outcome of this Board proceeding, were not influenced by any intervening cause. In fact, no intervening cause even exists.

d. *The statute of limitations issue*

Respondent contends (Br. pp. 28–32) that this action is barred by Section 10(b) of the Act. This agreement is totally without merit and is entitled to only brief discussion.

Section 10(b) of the Act provides:

> That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .

The Board has said that the 6-month limitations period does not begin to run until the person adversely affected is put on notice, actual or constructive, of the act constituting it. *Metromedia, Inc.–KMBC-TV*, 232 NLRB 486, 488 fn. 20 (1977).

Congress added Section 10(b) to the Act in 1947 for a twofold purpose—''to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, and of course to stabilize existing bargaining relationships.''[13] Just as the first reason enhances the integrity of the fact finding process, the second ground serves an equally important purpose of establishing a sense of repose over disputes among employers, employees, and unions. Because, in the main, employment as well as bargaining relationships tend to be ongoing, Section 10(b) reflects a policy judgment that it is better for these relationships (and for industrial peace in general) to bring the disputes to a head in fairly short order rather than to have an extended period in which to vindicate a statutory right. *Kanakis Co.*, 293 NLRB 435 (1989).

In the instant case, all agree that the grievance in issue was filed on May 31 (G.C. Exh. 6). Respondent's own submission to the CIR on behalf of its grievance begins, ''This grievance was filed on May 31, 1988.'' (R. Exh. 8, p. 1.) The collective-bargaining agreement under which the grievance purports to have been filed reads in pertinent part:

> Any complaint, dispute or grievance not filed in writing by the complaining party within thirty (30) days of the date of the alleged complaint, dispute or grievance shall be waived. [G.C. Exh. 3, Sec. 2.18.]

In light of the factual references cited above, I find the limitations period begins to run from May 31, the date of filing of the grievance. The filing of the charges on July 26 is therefore timely.

While Respondent presented evidence that prior to May 31, both Jordan and McGuire had expressed objections to the services by Chapter to its nonunion members, said complaints do not qualify as grievances under the labor agreement, for statute of limitations purposes. If they did, the grievance would be void pursuant to Section 2.18 of the agreement recited above. Moreover, the objections prior to May 31 were based not on alleged violation of specific contract provisions, but were based generally on Respondent's resentment at losing market share to nonunion contractors and at Chapter's perceived support of that process. So long as Respondent complained verbally and informally, Chapter was under no coercion to abandon its nonunion programs. Only when Respondent put its grievance in writing did it achieve its goal of shutting down the programs.[14] For the 10(b) period to begin to run, all that is required is that the ''Act'' giving rise to unlawful conduct be known. To require more would reduce Section 10(b) to the meaningless. *Al Bryant, Inc.*, 260 NLRB 128, 135 fn. 19 (1982).

In conclusion, I note that the Board has interpreted the words ''to enter into'' [taken from Section 8(e) of the Act] broadly to encompass the concepts of reaffirmation, maintenance or giving effect to any agreement which is within the scope of Section 8(e). *Mine Workers (Garland Coal)*, 258 NLRB 56, 58 (1981). See also *Bricklayers Local 2 v. NLRB*, 562 F.2d 775, 781 fn. 27 (D.C. Cir. 1977). As I will find below, Respondent's attempt to enforce certain sections of the labor agreement by the processing of its grievance violated Section 8(e) of the Act and since the May 31 grievance was within the 10(b) period, this case is not barred.

2. Alleged violations of the Act

a. *The alleged 8(e) violation*

I begin with Section 8(e) of the Act which reads in pertinent part as follows:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer,

[12] I express no opinion on whether the suspension of Chapter, short lived or not, for the stated reason, violates the Act.

[13] *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411, 419 (1960).

[14] Compare *Electrical Workers IBEW Local 6*, 257 NLRB 573 (1981).

> or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such agreement shall be to such extent unenforceable and void.

Next, I turn to the grievance filed by Respondent and quote in part the relief requested:

> Finally, we are asking that all members of the Puget Sound Chapter of NECA cease and desist from engaging in inside electrical construction work unless it is in accordance with the language agreed to by the parties to the Labor Agreement. While the terms and conditions of employment may not apply to specific firms which have not assented to the Agreement by signing a letter of assent, it is our contention that those firms are bound to the sections of the Agreement agreed to by the parties. Therefore, such Sections as those which deal with the training of Journeymen and others and referral of applicants for employment do apply to the Puget Sound Chapter of NECA and its component parts which define it as an organization and entity, namely its members. [G.C. Exh. 6, p. 3.]

The decision of the CIR has been set forth in the Facts, above, and need not be repeated.

I turn next to pertinent sections of the labor agreement. Section 5.02 states: ''The Union shall be the sole and exclusive source of referral of applicants for employment.'' Other relevant sections read as follows:

> 3.12 There shall be a Joint Apprenticeship and Training Committee of three members representing the Employer and three members representing the Union. This committee shall make local standards in conformity with the National Apprenticeship and Training Standards for the Electrical Contracting Industry governing the selection, qualifications, education, and training of all apprentices. It shall also be responsible for training Journeymen and others. These local standards will be promptly agreed upon by the parties to this Agreement and shall be registered with the National Joint Apprenticeship and Training Committee and the appropriate State or Federal Apprenticeship Registration Agency.
>
> 3.16 All apprentices must enter the program through the Committee and shall not be eligible for employment until they have been indentured to the Committee. An apprentice who has completed his probationary period may be removed from training by the Committee in accordance with its rules, for cause. Such removal by the Committee also cancels his classification of apprentice and opportunity to complete his training.
>
> 3.17 The Committee is authorized to and shall indenture sufficient new apprentices to provide for the availability of a total number of apprentices in the training area not to exceed a ratio of one apprentice to three Journeyman Wiremen who are normally employed under the terms of this Agreement.
>
> An individual Employer shall employ only indentured apprentices secured from the Committee. No Employer is guaranteed any specific number of apprentices. The Committee will determine whether or not any individual Employer is entitled to an apprentice as well as the total number of apprentices to be assigned to that Employer. 3.19 The parties to this Agreement shall enter into a joint Apprenticeship and Training Trust Fund Agreement which shall conform to Section 302 of the Labor-Management Relations Act of 1947, as amended.
>
> The Trustees authorized under this Trust Agreement are hereby authorized to determine the reasonable value of any facilities, materials, or services furnished by either party. All funds shall be disbursed in accordance with this Trust Agreement.

Professor Morris explains the application of Section 8(e) to provisions of a labor agreement such as those quoted above.

> Section 8(e) applies only to agreements with secondary objectives. Agreements with primary objectives are not unlawful even if the literal application of Section 8(e) seems to prohibit them. As the court in [*National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 645 (1967)] stated. ''The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees. . . .'' If the object of a suspect clause is to benefit union members generally, as distinguished from employees within the bargaining unit, the clause violates Section 8(e). If however, the object is to preserve the work of the bargaining unit or otherwise benefit unit employees, the clause is presumptively lawful. [II Morris, *Developing Labor Law*, 1197 (2d ed. 1983).]

I find that the provisions quoted above from Articles 3 and 5 of the labor agreement as interpreted by the CIR are unlawful under Section 8(e) of the Act. In support of this conclusion, I note that the object of the suspect clauses is to benefit union members generally, rather than unit employees because these clauses require Chapter in effect to cease doing business with its nonunion members.[15] The evidence in this case shows that the primary services which Chapter provides to its nonunion members are job referral and apprentice training. Without these programs, nonunion members will withdraw from the Chapter. This is the gist of the testimony provided by the three contractors called by General Counsel. Another contractor, Dwyer Electric apparently has already withdrawn from Chapter because of the CIR decision (C.P. Exh. 2, Exh. B.)

In determining whether various clauses require a cessation of business, the Board does not limit itself to the particular words used in the provisions. Rather the Board considers all the circumstances, necessary implications, and effects of the provisions. II Morris, ibid, p. 1200, citing *Lithographers*, Local 78, 130 NLRB 968, 976 (1961).

Thus a circumstance which cannot be ignored in the present case is the status of Chapter. Both Respondent and Amici argue that Chapter is a party to the labor agreement. I reject this claim. Cf. *Colorado Building Trades Council*, 239 NLRB 253, 256 (1978). Instead, I find that Chapter is a multiemployer bargaining group for its union members. As

[15] See *Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562 (1989).

such, Chapter acts as agent for the union signatories who are the real parties to the agreement. Chapter has only that degree of authority delegated to it by its union members. See *Custom Color Contractors*, 226 NLRB 851, 852–853 (1976); *Hillsdale Inn v. NLRB*, 764 F.2d 739, 742 (10th Cir. 1985). This is a circumstance tending to support a finding that the labor agreement clauses recited above violate Section 8(e) because their effect is not confined to the signatories of the labor agreement.

In addition to the suspect provisions of the labor agreement as interpreted, discussed above, this case also concerns the filing of the grievance to enforce these provisions.

As a general rule, processing of disputes through the grievance machinery is a vehicle by which meaning and content are given to the collective-bargaining agreement. *Bache v. AT&T*, 840 F.2d 283 (5th Cir. 1988). Yet, not all grievances are proper. The Board has limited access to grievance proceeding where the claimant sought to compel an act which was directly and in itself unlawful. *Hanford Atomic Metal Trades Council (Rockwell International)*, 291 NLRB 418 (1988).

The grievance filed by Respondent in the instant case was directly and in itself unlawful because under Board law, the words from Section 8(e) ''to enter into,'' have been interpreted broadly to encompass the concepts of reaffirmation, maintenance or enforcement of any agreement which is within the scope of Section 8(e). *Mine Workers*, supra, 258 NLRB at 58. See also *Carpenters Local 743 (Longs Drug)*, 278 NLRB 440, 443 (1986); *Hotel & Restaurant Employees Local 531 (Angelus Auto Parks)*, 237 NLRB 1204, 1206 (1978), enfd. 623 F.2d 61 (9th Cir. 1980). Since Respondent was attempting to enforce an 8(e) contract by filing the grievance, Respondent violated Section 8(e) for this reason as well.

In finding that Respondent has violated Section 8(e) as described above, I find that the relevant clauses had secondary objectives which required Chapter to cease doing business with its nonunion members. I reject any defense based on the claim that the provisions merely sought to preserve, for the employees within the bargaining unit, work that they have traditionally performed. See *Chemical Workers Local 6-18 (Wisconsin Gas)*, 290 NLRB 1155 (1988).[16]

b. *The alleged 8(b)(4)(ii)(A) violation*

Again I begin the discussion by turning to the statute in question:

> Section 8(b)—It shall be an unfair labor practice for a labor organization or its agents:
>
> (4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> (A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by Section 8(e).

I turn next to a case cited by General Counsel (Br. p. 17) *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988). There the Board affirmed the Administrative Law Judge's holding that Respondent violated Section 8(b)(4)(ii)(A) by filing a grievance based on an interpretation of a provision in the collective-bargaining agreement that would convert the provision into a de facto hot cargo provision, in violation of Section 8(e). This case applies to the instant case.

The term ''hot cargo agreement'' refers to provisions in labor agreements which provides that unit employees need not handle nonunion, unfair or struck goods of other employers.[17] Such provisions were outlawed by Congress in 1959 in Section 8(e). Section 8(b)(4)(A) prohibits a union from picketing or otherwise attempting to force an employer to agree to a hot cargo provision.[18]

In the instant case, Respondent violated the cited statute by filing the grievance which asked not only that Chapter cease and desist but that it pay to Respondent certain alleged damages, to be determined by audit. On July 13, the parties met and Respondent offered to drop its demand for damages if Chapter would enter into an agreement prohibited by Section 8(e) (G.C. Exh. 12).

Of course any discussion of unlawful threats and coercion cannot ignore the CIR decision itself and the threats of Respondent officials to seek court enforcement if Chapter did not obey the CIR decision. All of this constitutes violations of Section 8(b)(4)(ii)(A) of the Act by Respondent and I so find.[19] Compare *Teamsters Local 483 (Ida Cal)*, 289 NLRB 924 (1988).

c. *The alleged 8(b)(1)(A) and 8(b)(2) violations*

In *Glaziers Local 558 (PPG Industries)*, 271 NLRB 583, 586 (1984), the Board stated as follows:

> Section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization, inter alia, to cause or attempt to cause an employer to discriminate against an employee to encourage or discourage membership in any labor organization. Section 8(b)(1)(A) makes it an unfair labor practice to restrain or coerce employees in the exercise of their Section 7 rights. As the Supreme Court stated in *Radio Officers v. NLRB*, 347 U.S. 17, 40 (1954), ''the policy of the Act is to insulate employees' jobs from their organizational rights. Thus, [Sections] 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood.''
>
> The Board presumes that a union acts illegally any time it prevents an employee from being hired or causes an employee to be discharged because by such conduct a union demonstrates its power to affect the

[16] I do not understand Respondent to have raised any issue in this case based on the construction industry proviso to Sec. 8(e). This case does not warrant such a defense. *Bricklayers Local 2*, supra, 562 F.2d at 787–788. Accordingly, discussion is not required. Similarly, any defense based on the alleged ''unclean hands'' of Chapter is rejected. This defense does not operate against a Charging Party. *Teamsters Local 294 (Island Duck Lumber)*, 145 NLRB 484, 492 fn. 9 (1963), enfd. 342 F.2d 18 (1965).

[17] II Morris, supra at 1192.

[18] Id. at 1196. See also *Iron Workers Pacific Northwest*, supra.

[19] In its Br. p. 20 the General Counsel asserts other examples of Respondent's coercion such as the filing of a counterclaim in Chapter's district court action and an alleged appeal of the district court's temporary injunction. None of this appears of record in the present case and would be cumulative in any event. I express no opinion thereon. Similarly, I express no opinion as to whether the threats and coercion of NECA against Chapter and the apparent temporary suspension of Chapter by NECA are in any way attributable to Respondent in further violation of Sec. 8(b)(4)(ii)(A).

> employee's livelihood in so dramatic a way as to encourage union membership among employees. A union may, however, rebut this presumption ''by evidence of a compelling and overriding character showing that the conduct complained of was referable to other considerations, lawful in themselves, and wholly unrelated to the exercise of protected employee rights or to other matters with which the Act is concerned.'' *Carpenters Local 1102 (Planet Corp.)*, 144 NLRB 798, 800 (1963).

The Board recently stated in *Carpenters Local 2396 (Tri-State Ohbayashi)*, 287 NLRB 760 (1987), that ''it is settled that, absent an exclusive hiring hall arrangement, a union violates Sections 8(b)(2) and 8(b)(1)(A) if it interferes or attempts to interfere with an individual's employment for union-related reasons.''

Section 8(b)(1)(A) of the Act prohibits unions from penalizing employees for exercising their Section 7 rights. *Professional Engineers Local 151 (General Dynamics)*, 272 NLRB 1051 (1984). Employees have a Section 7 right to refrain from joining a union.

More specifically, where a union's filing and processing of a grievance adversely affecting employees is prompted by an unlawful and discriminatory objective rather than by a genuine concern over the merit of the grievance or the integrity of the collective-bargaining agreement, the union's conduct falls within the proscriptions of Sections 8(b)(1)(A) and (2) of the Act. *Teamsters Local 515 (Cavalier Corp.)*, 259 NLRB 678, 681 (1981); see also *Food & Commercial Workers District 227 (Kroger Co.)*, 247 NLRB 195 (1980).

I agree fully with General Counsel at pages 20–23 of his brief, that as a result of Respondent's unlawful acts, those employees who have chosen to remain nonunion have been discriminated against. They are obviously precluded from job referrals through the union hiring hall because they are not members of the Union. Now they are precluded from referral through Chapter's nonunion job referral which has been terminated by virtue of the CIR decision for which Respondent is responsible. Those persons seeking to become apprentices are faced with the same dilemma.

As a result of this, those employees who have chosen to remain nonunion are coerced into joining the Union, which by virtue of its exclusive hiring hall, holds the key to employment. In addition, those employers, who have chosen to remain nonunion are coerced into becoming signatories to the labor agreement so they may have a ready, efficient and skilled source of labor without having to resort to newspaper want-ads, word-of-mouth referrals, or the unreliable system of walk-in applications. Based on the above, I find that Respondent has violated Sections 8(b)(1)(A) and 8(b)(2) of the Act.[20]

[20] The case of *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983), provides no help to Respondent. In that case, the Supreme Court held that an employer's prosecution of a retaliatory suit against picketing employees constitutes an unfair labor practice under Sec. 8(a)(1) if (1) the suit is filed with an improper motive, and (2) lacks a reasonable basis in law. In *Teamsters Local 25 v. NLRB*, 831 F.2d 1149 (9th Cir. 1987), the court enforced a Board decision that found a union had committed unfair labor practices by filing and processing multiple grievances. At 1154 fn. 4, the court noted that in finding improper motivation for the filing of the grievances, the Board may not be required to satisfy the stringent *Bill Johnson's* benchmark before condemning a union's abuse of the grievance procedure. See also *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1303, 1304 (1986). I find that Respondent's grievance had unlawful objectives as found in this decision. Accordingly, the Board is not precluded from enjoining Respondent from continuing to process the grievance and the CIR decisions.

## CONCLUSIONS OF LAW

1. Power City Electric Co., Collins Electric Co., and Superior Electric Service Co. are employers engaged in commerce on in industries affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, International Brotherhood of Electrical Workers, Local Union, No. 46, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not met its burden of proof with respect to its affirmative defenses.

4. By entering into, maintaining, giving effect to, and seeking to enforce by the filing of a grievance, sections 5.02; 3.12; 3.16; 3.17; and 3.19 of the collective-bargaining agreement, effective June 30, 1986, through May 31, 1988, between Chapter and Respondent, the Respondent has engaged in unfair labor practices in violation of Section 8(e) of the Act.

5. Under the circumstances described in paragraph 4 above, the CIR decision issued as the result of Respondent's grievance also violates Section 8(e) of the Act.

6. By attempting to enforce an exclusive hiring hall referral clause and apprentice training clauses which could, in effect, require chapter to terminate its employee job applicant and apprentice training programs to its nonunion members, Respondent has violated Section 8(b)(4)(ii)(A) of the Act.

7. By processing its grievance with respect to an 8(e) contract, Respondent has caused Chapter to discriminate against nonunion employees and nonunion contractors and has thereby violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

8. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I recommend it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, and that it post an appropriate notice attached hereto as Appendix I. In addition, Respondent shall make whole for any loss of wages or benefits they may have suffered, those persons who lost employment opportunities between October 13, the date Chapter terminated its services to its nonunion members, and whatever date Respondent complies with this Order. This relief includes but is not limited to Chapter employee Gwen Tuthill, who was terminated effective October 31, because the nonunion program was terminated, the income Chapter may have lost due to nonunion members withdrawal because of the CIR decision, and any increased costs of nonunion contractor members of Chapter caused by the termination of the nonunion services.[21] Such computations required will be as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus

[21] In addition, General Counsel should have an opportunity at compliance to demonstrate the existence of a defined and easily identified class, to wit, those nonunion job applicants and apprentice trainees, who may have lost job opportunities due to the Respondent's actions in obtaining the CIR decision. However, the Board has expressed caution in this type of case where the members of the class are subject to reasonable dispute. See *Teamsters Local 158 (Contractors of Pennsylvania)*, 280 NLRB 1100, 1101 (1986).

interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]